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FISCAL IMPACT REPORT

SPONSOR McSorley DATE TYPED 2/19/04 HB _____

SHORT TITLE Streamline Capital Outlay Process SB SJM 67/aSIAC

ANALYST Gilbert

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
			NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

No Responses From

Attorney General’s Office (AGO)

Office of Indian Affairs (OIA)

SUMMARY

Synopsis of SIAC Amendment

The Senate Indian and Cultural Affairs Committee amend the bill as follows:

- ❑ Removes the Office of Attorney General as an entity in the streamlining of the capital outlay process- Reference “Administrative Implications” “ Other Substantive Issues” below;
- ❑ Clarifies language on the need for a “new capital request or reauthorization” of some capital projects;
- ❑ Strikes language on collaboration between the NM Office of Indian Affairs with the Environment Department and the Transportation Department and the Office of Cultural Affairs on providing archaeological clearances. Reference “Administrative Implications” below.
- ❑ Inserts language that the Office of the Governor, Department of Finance and the NM Office of Indian Affairs collaborate with the NM Indian nations, tribes and pueblos to develop a strategic plan for capital projects.

Synopsis of Original Bill

Senate Joint Memorial 67 states that capital projects in Indian nations, tribes and pueblos linger without completion because of partial funding, lack of project readiness, and lack of a reliable reporting system.

The bill also concludes that training for the tribes in how to develop scopes of work, joint powers agreements (JPAs) and use of boiler plate forms may streamline and expedite the capital outlay process. Therefore, this bill requests the Department of Finance and Administration (DFA) to work with the New Mexico Office of Indian Affairs (OIA), the New Mexico Attorney General's Office (AGO), and other state agencies to streamline the capital outlay process on tribal lands.

This bill also recommends that the AGO work collaboratively with the OIA to develop a standard method for determining indigency to allow power projects in the communities.

Significant Issues

Senate Joint Memorial 67 instructs the AGO to collaborate with OIA on developing boiler plate forms for scopes of work and JPAs.

According to the AGO, they have already developed and utilized standard language for JPAs including provisions relating to equal opportunity compliance, arbitration, liability and conflict resolution (sovereign immunity), and non-discrimination. A standard JPA document was approved by both the Navajo Nation and the AGO. The AGO turned over responsibility for development and review of JPAs for capital outlay projects to General Counsel for the OIA in 2003. We understand that the OIA presently uses the same standardized language in its JPAs and this Office continues to provide legal assistance to OIA's General Counsel when requested.

FISCAL IMPLICATIONS

The AGO stated that this bill will result in allocating additional staff resources to work with the OIA on more standardized forms and training.

The bill relates to the 302 tribal capital outlay projects that are administered by the OIA, which totals \$20.1 million in state appropriations.

ADMINISTRATIVE IMPLICATIONS

Although the AGO supports the continued provision of training for tribes in developing appropriate scopes of work for capital projects receiving a state legislative appropriation, the AGO cannot serve as legal counsel to tribal governments or tribal governmental entities. We believe that the OIA utilizes a standardized scope of work document; however, our experience has been that scope of work documents are specific to each tribal project. Therefore, the AGO is uncertain what greater role it can play in furthering this objective.

The Office of Indian Affairs indicated that it is currently performing the following task:

Boilerplates and training: To streamline the process, the Office of Indian Affairs already utilizes standard language for its joint powers agreements and it has also de-

veloped boiler plate forms for the scope of work and the subcontractor form. On several occasions, the OIA has also provided tribes training on the state's capital outlay process.

Reporting: In addition to its own internal reporting, the Office of Indian Affairs works with the Capital Outlay Monitoring System (CPMS) which is run by the DFA.

Environmental assessments and archaeological clearances: The OIA continues to work with tribal governments in ensuring that they provide the state with copies of archaeological clearances and environmental assessments because that is a **federal-tribal government function**. Because tribal lands are held in trust by the federal government, the OIA and the AGO have worked out a mechanism through the joint powers agreements to ensure that they are provided with the information by the Tribes.

The OIA has found that the reason why tribal capital outlay projects are delayed is because they are severely under funded; not because of the lack of boilerplates or reporting mechanisms.

OTHER SUBSTANTIVE ISSUES

This bill also recommends that the AGO work collaboratively with the OIA to develop a standard method for determining indigency to allow power projects in the communities. This recommendation is unclear. If the appropriation covers a power project associated with residential homes, for example, the AGO has deferred to a tribe's certification that the associated housing program serves the needs of indigent citizens. The AGO has not raised indigency as a legal barrier for larger power projects on tribal lands. Rather, a legal issue for power projects has been ownership of the rights-of-way involved, for example, in line extensions. Since the Whitehorse Lake appropriation (1993) and the Burnham chapter power line extension project in San Juan County (1994), the AGO has taken the legal position that in order to avoid violating the Anti-donation Clause of the New Mexico Constitution (Art. IX, § 14), ownership must be in the pueblo, tribe, or nation itself, or for the Navajo Nation in the Navajo Tribal Utility Authority (NTUA) – which entity this office recognizes to be, for purposes of anti-donation clause analysis, the Nation itself, engaged in the performance of a governmental function. In no event, however, may a private utility company (including cooperatives) own the rights of way or the lines themselves. Therefore, the AGO is not certain how it would implement this provision of SJM 67.

The comments and testimony consistently presented in various public forums during the last two years indicates that the tribes need assistance from the State of New Mexico in processing required written documents, facilitating the certification process, and in navigating state procedures in obtaining state funding due to a lack of expertise. According to the AGO, while standardized forms can and have helped facilitate the process, they can do little to address more substantive issues with the capital outlay process.

The bill only targets capital outlay projects on tribal lands. Tribal governments are sovereign entities who have jurisdiction over their Nation's lands, including issues related to developing their capital infrastructure. The State and the 22 New Mexico Indian Tribes have a long history

of partnering to address some of the needs of common citizens including developing the basic infrastructure needs of tribal communities. The Office of Indian Affairs has not only served as a liaison between State and Tribal Governments, it has worked with Tribal offices to ensure that state funds are being utilized in the most appropriate manner and timeframe, including capital outlay.

POSSIBLE QUESTIONS

Why is SJM 67 only targeting tribal capital outlay projects? The OIA believes there are serious problems associated with capital outlay projects across the board and that the Governor wants them addressed.

RLG/lg:yr:dm